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Before the
FEDERAL COMMUNICATIONS COMMISSION FEB 7 - 1997
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	))	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	))	MM Docket No. 87-7

COMMENTS OF JACOR COMMUNICATIONS, INC.

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SUMMARY

When first adopted in 1970, the one-to-a-market rule was considered necessary to promote diversity and competition in a world where the public depended almost entirely on television, radio and newspapers for information and entertainment. The world has changed considerably since then. The number of TV and radio stations has increased by more than 70 percent. In addition, a tremendous assortment of video programming is universally available through cable television and direct to home satellite services. For an ever-increasing portion of the population, the Internet and on-line services provide access to a nearly infinite number of "voices." Advertisers now can choose among a large number of competing vehicles. In light of these developments, and the acknowledged public interest benefits that are made possible through common ownership of radio and TV stations, the one-to-a-market rule is simply unnecessary and is an obstacle to achieving the efficiencies and other public benefits of common ownership. Accordingly, the Commission should eliminate the rule altogether.

If the Commission nevertheless retains the one-to-a-market rule, it at least must make changes in its application that reflect the breadth and scope of non-broadcast media available today. At a minimum, the Commission should adopt a rule permitting radio/TV combinations in any market in which there are fifteen independent voices. The presence of fifteen independent voices is more than adequate to preserve media diversity and prevent the accumulation of market power in the overall local advertising market. This approach is entirely consistent

with the steps taken by Congress in the Telecommunications Act of 1996 to increase common ownership of radio and TV stations.

In markets where the "fifteen voices" test is satisfied, a TV operator should be allowed to own the maximum number of radio stations permitted under Section 202(b) of the 1996 Act. Congress raised the local ownership caps in recognition of the substantial public benefits that can be realized through common ownership. Where an acquisition poses no threat to diversity or competition in the overall advertising market (*i.e.*, where there are fifteen independent voices), there is no reason to deny these public benefits by restricting the number of radio stations in a radio/TV combination.

If -- despite all -- the Commission retains a numerical "voices" standard, it must make at least two changes in the way it counts voices to more rationally reflect the world of today. First, the Commission should count all radio stations licensed within or with significant penetration in the relevant DMA (rather than just radio stations licensed to the television metro market). The appropriate standard is one that counts all broadcast stations that compete within the market served by the TV station, that is, the DMA.

Second, at a minimum, the Commission should count every cable operator, DTH provider and Internet service provider in the DMA. This approach provides a more accurate reflection of the level of diversity than the broadcast-only test the Commission presently uses, although it still would undercount media diversity -- because each of these providers offers access to multiple "voices."

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In sum, given the substantial media diversity that exists today, the public would be well served by elimination of the one-to-a-market rule. If the Commission decides not to eliminate the rule completely, it must, at a minimum, substantially relax the rule to more accurately reflect the quantity and variety of "voices" that exist today.

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COMMENTS OF JACOR COMMUNICATIONS, INC.

Jacor Communications, Inc. ("Jacor"), by its attorneys, hereby submits its comments in response to the Commission's *Second Further Notice* in the above-referenced proceedings. 1/ As demonstrated below, the Commission should eliminate its radio/TV ownership rule, also known as the one-to-a-market rule, because it is no longer necessary in today's multimedia world. At a minimum, the Commission should at least relax the rule to permit radio/TV combinations in any market in which there are at least fifteen independent voices.

I. INTRODUCTION

Jacor is the ultimate parent of the licensee of several radio stations and a TV station in Cincinnati, Ohio, pursuant to a temporary waiver of the one-to-

1/ *Review of the Commission's Regulations Governing Television Broadcasting/Television Satellite Stations - Review of Policy and Rules*, Second Further Notice of Proposed Rulemaking, MM Docket Nos. 91-221/87-7, FCC 96-438 (released November 7, 1996) ("*Second Further Notice*").

a-market rule granted last year when Jacor acquired Citicasters Co. 2/ In addition, Jacor competes against radio/TV combinations in many of its other markets. Accordingly, Jacor is an interested party in this proceeding and is well-qualified to comment on the Commission's one-to-a-market rule.

As demonstrated below, the one-to-a-market rule is antiquated and should be eliminated. The substantial increase in both broadcast and non-broadcast media outlets has rendered the rule unnecessary to achieve the Commission's original policy goals. Moreover, the rule prevents broadcast stations from realizing the efficiencies and other public interest benefits of common ownership.

If the Commission nevertheless chooses to retain the one-to-a-market rule, the rule should be amended to routinely permit radio/TV combinations in any market with fifteen or more independent voices. Furthermore, as long as the fifteen voice test is satisfied, the Commission should not restrict a TV station owner from also operating up to the maximum number of radio stations permitted by Congress under Section 202(b) of the Telecommunications Act of 1996. 3/ Any limitation on radio ownership in a market would be inconsistent with the deregulatory policies underlying the 1996 Act and with Congress' express recognition that common ownership of multiple radio stations in a market serves the public interest.

2/ *Shareholders of Citicasters Inc. and Jacor Communications, Inc.*, Memorandum Opinion and Order, File Nos. BTC, BTCH, BTCCT - 960222IA through 960222IV, FCC 96-380 (released September 17, 1996) ("*Citicasters Order*").

3/ Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"), § 202(b).

Moreover, if the Commission nevertheless chooses to retain a numerical "voices" test, it must consider other available voices (*e.g.*, cable, DTH, Internet, etc.) in the relevant DMA. The failure to reflect the availability of competing voices in the market would be arbitrary and capricious.

II. CHANGED CIRCUMSTANCES JUSTIFY ELIMINATION OF THE ONE-TO-A-MARKET RULE.

A. The Public Today Enjoys A Diversity Of Media That Was Inconceivable When The One-To-A-Market Rule First Was Adopted.

The one-to-a-market rule, like the Commission's other ownership rules, is intended to promote the twin goals of diversity and competition. 4/ While these goals still are important today, the one-to-a-market rule is no longer needed to achieve them. First, there are a substantially greater number of broadcast outlets than there were at the time the rule was adopted. The number of radio stations has increased by over 70 percent since 1970. 5/ The number of television stations also has increased by more than 70 percent, 6/ and the number of broadcast networks providing programming to those stations has doubled as well. In short, there are far more broadcast voices available now than there were in 1970.

4/ *Second Further Notice* at ¶ 59, *citing Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 22 F.C.C.2d 306, 310, 313 (1970) ("*1970 Order*").

5/ *See* Broadcasting and Cable Yearbook 1995 at B-655.

6/ *Id.* at C-225.

Second, and equally important, there has been an explosion in alternative media sources that has further expanded the universe of voices and competitors. For example, at the time the one-to-a-market rule was adopted, cable television consisted primarily of the transmission of distant broadcast signals and was not even close to being universally available. Now, cable passes more than 96 percent of homes and is subscribed to by almost 65 percent of the population. 7/ Almost 80 percent of cable systems now provide 30 or more channels, and new services are being added continually. 8/ In addition, direct to home (DTH) satellite services, which did not exist when the rule was adopted, provide a comparable assortment of video programming. DTH service is nearly universally available, and already serves almost 4 million customers. 9/ Wireless cable systems also are available in many markets, and digital audio radio service (DARS) is on the horizon.

In addition to these multichannel video services, a growing percentage of the population now has access to the Internet and on-line services such as America Online. These consumers can easily reach a nearly infinite number of "voices," and for many subscribers on-line services have become a readily available

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7/ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, CS Docket No. 96-113, FCC 96-496 (released January 2, 1997) at Appendix B, Table 1.

8/ *Id.* at Appendix B, Table 3; Appendix G.

9/ *Id.* at Appendix C, Table 1.

alternative to traditional broadcast media. 10/ Just as significantly, the development of the Internet over the past few years has created a means by which speakers (including advertisers) now can reach millions of potential listeners without using traditional broadcast media.

In defining the universe of media voices, the Commission also must consider print media. Newspapers and magazines certainly were available at the time the Commission adopted the one-to-a-market rule. However, particularly with regard to magazines, a far greater assortment and degree of specialization exists than was the case 25 years ago. And, unlike 25 years ago, the dissemination of print media has expanded exponentially, with magazines and newspapers now available on-line through the Internet. Consequently, from a diversity perspective, it is certainly the case that consumers enjoy far more diversity in the print media than when the one-to-a-market rule first was adopted.

B. The Potential Benefits Of Common Ownership Of Radio And TV Stations Are Significant.

Standing alone, the plethora of broadcast and non-broadcast speakers that exist today in virtually every geographic market provides a sound basis for elimination of the one-to-a-market rule. However, this tremendous media diversity is not the only reason why such deregulation is appropriate. Continued application of the one-to-a-market rule also has the harmful effect of preventing stations from

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10/ *See* Communications Daily, February 3, 1997 at 7 (Study by America Online and Nielsen Media Research found that "families with AOL spent 15 percent less time watching TV than the average U.S. family").

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realizing efficiencies and other public benefits that result from common ownership of radio and television stations. The Commission has long recognized that common ownership is beneficial when it creates the potential for stations to be operated more efficiently. 11/ Common ownership is beneficial not only from a business perspective, but also from a public interest perspective. Commonly owned stations have the resources and the staff to be able to provide more news and public affairs programming than they could as independent stations. This was one of the reasons supporting the Commission's grant of a waiver for Jacor to acquire Citicasters' stations. 12/ Over and over again, the Commission has been presented in requests for waivers of the one-to-a-market rule with evidence of the concrete public interest benefits of common radio/TV ownership.

Similarly, a company with multiple broadcast stations in a market has the incentive and the financial base to devote more time to niche programming than an independent owner. With the efficiencies from joint administrative staffs and reduced overhead, multiple station owners have the ability, unlike stand-alone stations, to program to different audience segments with particularized programming. Specialized niche formats which do not have as broad an audience-

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11/ *See Citicasters Order* at ¶ 18, *citing Great American Television and Radio Co.*, 4 FCC Rcd 6347, 6349 (cost savings and economic efficiencies are "precisely the type of public interest benefit from common station ownership which we envision as warranting a waiver of the one-to-a-market rule").

12/ *Citicasters Order* at ¶ 18 (recognizing that cost savings from common ownership would enable Jacor to provide improved news and weather coverage and additional public interest programming).

base, such as business news, children's and nostalgia, often cannot survive on a stand-alone basis. But a multi-station owner, with the cost-savings of joint operations, has the resources to support niche programming. It also has the incentive to reach out with diverse programming in order to tap into markets not reached by its more mainstream outlets. Thus, common ownership means more diversity, not less.

In sum, the public today enjoys a diversity of voices that did not exist 25 years ago -- and could not even have been foreseen. In this environment, the one-to-a-market rule is antiquated and unnecessary; its primary significance is to prevent efficiencies and public interest benefits possible through joint operation of radio and TV stations. Accordingly, the Commission should eliminate the one-to-a-market rule as soon as possible.

III. AT A MINIMUM, RADIO/TV COMBINATIONS SHOULD BE PERMITTED IF THERE ARE MORE THAN FIFTEEN INDEPENDENT VOICES IN A MARKET.

A. Fifteen Independent Voices In A Market Is Sufficient To Preserve Diversity.

As demonstrated in the previous section, the substantial growth in broadcast and non-broadcast media provides the public with access to more voices than ever thought possible at the time the one-to-a-market rule was adopted. Jacor believes these developments warrant elimination of the rule, but if the Commission nevertheless decides to retain the rule, it must relax its application to reflect these marketplace changes.

To more accurately reflect the development of non-broadcast media such as cable, satellite and the Internet, Jacor believes the standard for the one-to-a-market test should be changed from thirty voices to fifteen. Given the substantial number of cable programming channels, DTH channels, print media, on-line service and Internet web sites, under no circumstances could a market with fifteen conservatively counted independent voices be considered to lack diversity. Moreover, while a fifteen voice test is more than adequate to preserve diversity, it has the benefit of increasing the opportunities for more efficient operation of stations through common ownership.

B. The Commission Should Eliminate The Requirement To Obtain A Waiver Or, Alternatively, The Waiver Process Should Be Streamlined.

To implement the standard proposed above, the Commission's rules should be amended to specifically permit radio/TV combinations (without a waiver) as long as the applicant demonstrates in its assignment or transfer application that there will be fifteen independent voices remaining in the relevant market after the transaction is completed. As long as this level of diversity is maintained, and given that multiple-station platforms repeatedly have been demonstrated to produce benefits to the public, there is no reason to delay the realization of those benefits by subjecting the parties to an unnecessary, time-consuming, and administratively wasteful waiver process.

If the Commission nevertheless continues to require waivers of the one-to-a-market rule, the waiver process should be streamlined so that it is less burdensome and provides substantial certainty to the parties. The waiver process should focus only on diversity issues and the Commission should not apply a supplemental "competition" test. First, in a market where the fifteen voices test is satisfied, a radio/TV combination will not raise competitive issues in the overall advertising market -- which is the relevant market. 13/ Advertisers will be able to choose among not only those "fifteen voices," but all of the print media, cable channels, outdoor locations, Internet sites and other advertising outlets available to them. Second, and in any event, even if fifteen independent voices in a particular geographic market theoretically might raise an issue as to the impact on competition in the overall advertising market, the Federal Trade Commission (FTC) and Department of Justice (DOJ) already are addressing these issues, and can intervene if circumstances warrant. 14/ Adding an extra layer of FCC review is unjustified and fundamentally inconsistent with the deregulatory policies underlying the 1996 Act. 15/

13/ *See Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule*, prepared by National Economic Research Associates, attached to Comments filed by the Local Station Ownership Coalition (May 17, 1995) ("NERA Study") (identifying cable, print and direct mail as competitors for radio and television in the local advertising market).

14/ *See, e.g., Citicasters Order* at ¶ 2 n.3.

15/ If the Commission nevertheless continues to review the competitive impact of acquisitions despite the antitrust agencies' purview over this area, the Commission must recognize the problems inherent in referring to broadcast advertising revenue shares as a measure of market power. Such measures are based on flawed

C. The Proposed "Fifteen Voices" Standard Is Consistent With The Deregulatory Policies Underlying The 1996 Act.

The changes proposed herein -- permitting by rule (or streamlined waiver process) radio/TV combinations in any market with 15 independent voices -- are entirely consistent with the actions taken by Congress in the 1996 Act. In the past, the Commission's primary concern has been increasing diversity (or minimizing any decrease in diversity) by limiting common ownership of radio and TV stations. 16/ In the 1996 Act, Congress expressed its desire that the Commission take a different approach in recognition that the media world has been turned upside down in the new information age. First, Congress required the Commission to immediately expand its existing waiver policy to the Top 50 markets and to increase the number of radio stations that a single company can own in one market. 17/ Second, Congress instructed the Commission to consider these media market changes in this proceeding, where the Commission already had proposed possible elimination or substantial relaxation of the one-to-a-market rule. Had

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information and fail to include direct competitors in non-broadcast outlets. The more appropriate measure is a company's share of the overall local advertising market. NERA Study at 10-15. At a minimum, the advertising revenues of cable television and newspapers must be included because these are direct substitutes that compete for advertising dollars. *Id.* at 12.

16/ *See 1970 Order*, 22 F.C.C.2d at 311 ("A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50").

17/ 1996 Act, § 202(d), (b).

Congress been concerned about the effect of the Commission's pending proposals, it would have placed limits on the Commission's authority to implement them or mandated that the Commission continue to enforce the one-to-a-market rule. Instead, Congress stated its expectation that the Commission would "take into account the increased competition and the need for diversity in today's radio marketplace that is the rationale for [expanding the existing one-to-a-market waiver policy]." 18/

Congress was referring to diversity and competition from additional broadcasting outlets, as well as competition from non-broadcast media. As we have shown, these revolutionary market changes justify elimination of the rule. But at a minimum, a rule that permits radio/TV combinations in any market with fifteen independent voices conservatively reflects the pro-competitive, deregulatory approach taken by Congress as well as the realities of today's multi-media environment. No broader restriction is justifiable or necessary to the public interest.

D. As Long As There Are Fifteen Independent Voices, A TV Operator Should Be Able To Own The Maximum Number Of Radio Stations Permitted Under The 1996 Act.

As discussed above, Congress made the determination in the 1996 Act that there were public benefits resulting from common ownership of radio/TV

18/ *See* Joint Explanatory Statement of the Committee of Commerce at 46 ("Conference Report").

combinations, and of multiple radio stations in a market. 19/ Not only are such combinations better able to compete with non-broadcast competitors, but the public benefits with better programming.

In a market in which there are no diversity concerns, *i.e.*, a market with fifteen independent voices, there is no reason to limit these benefits by artificially restricting the number of radio stations in a radio/TV combination. Given the availability of print media, cable channels, DTH and the Internet, a TV operator's acquisition of radio stations will have no material effect on diversity if there are fifteen remaining independent voices. As noted above, each radio station added to common ownership is more likely to be free to provide new and different programming of interest to the public than independent stations. Similarly, expanding a joint radio licensee's holdings to include a television station will not result in a material increase in concentration in the overall advertising market, in the face of much larger competitors such as newspapers. Moreover, in the unlikely event that a radio/TV combination in a "diverse" market raises competitive issues, the FTC and DOJ have ample authority to intervene as necessary.

19/ Conference Report at 45-46.

IV. THE COMMISSION MUST ADJUST THE MANNER IN WHICH IT COUNTS THE NUMBER OF VOICES IN A MARKET IF IT RETAINS THE ONE-TO-A-MARKET RULE.

In no event can the Commission completely blind itself to the staggering changes in the media market. If the Commission nevertheless retains a numerical "voices" standard, it at least must modify the standard so that it is more rationally related to the world of today.

First, the Commission must count all radio stations licensed within, or whose service area contours have significant penetration in, the relevant DMA. 20/ The current test, which only counts radio stations licensed to the television metro market, significantly undercounts the number of available media voices in the area that counts -- the DMA. Because it is the market reach of the TV station in a radio/TV combination that presumably is the basis for the Commission's concern -- a concern we believe is unfounded -- it is entirely appropriate for the Commission's test to include all radio stations in the same market area as the TV station.

Second, if the Commission retains a numerical voices standard, it also should consider other relevant non-broadcast media, including print, Internet, cable and other multichannel video providers, such as DTH. As noted above, broadcast outlets are no longer the only relevant "voices" available to consumers. The Commission could find that every cable programming channel and every DTH channel is a separate voice. The Commission could make a similar finding with

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20/ For purposes of this test, significant penetration would mean 40 percent of the station's service contour (such as 1 mV/m for FM stations) overlaps the DMA.

regard to every daily newspaper, every weekly periodical and every web site directed to the public. Each locally programmed cable channel, such as local/regional news channels, government channels and public access channels, is a source of independent viewpoints that could be separately counted to reflect the diversity available to the public. Such findings would, of course, make clear that the one-to-a-market rule is obsolete and should be eliminated.

At a minimum then, the Commission should count as independent voices: (1) each independent cable system operator serving the DMA; (2) each DTH service sold in the DMA; (3) each Internet service provider operating in the DMA. This approach would still undercount media diversity -- because each of these providers offers its customers access to numerous voices -- but at least it would be somewhat more accurate than the current method.

V. CONCLUSION

The world has changed and the Commission's ownership rules must keep pace. Based on the explosive growth in broadcast and non-broadcast media over the last 25 years, the Commission should eliminate the one-to-a-market rule. Any rule retained by the Commission should permit without waivers radio/TV combinations -- with the maximum number of radio stations permitted by Congress -- in any market where there are fifteen independent voices. If the Commission nevertheless retains a numerical "voices" standard, it should count, at a minimum, all radio and TV stations in the relevant DMA, as well as cable operators, DTH providers and Internet services. Any other result would be arbitrary and capricious.

Respectfully submitted,

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